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**ADMITTED IN PENNSYLVANIA ONLY

June 17, 1993

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Dear Ms. Searcy:

Enclosed for filing are an original and seven copies of the Comments of the City of Alexandria, Virginia in MM Docket No. 92-266.

Very truly yours,

MILLER & HOLBROOKE

By Frederick E. Ellrod III
Frederick E. Ellrod III

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992	**MM Docket No. 92-266**
Rate Regulation	

COMMENTS OF THE CITY OF ALEXANDRIA, VIRGINIA

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JUN 17 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992	MM Docket No. 92-266
Rate Regulation	

COMMENTS OF THE CITY OF ALEXANDRIA, VIRGINIA

The City of Alexandria, Virginia ("City") submits these comments in response to the Further Notice of Proposed Rulemaking ("FNPRM") issued in this docket. In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order and Further Notice of Proposed Rulemaking at ¶¶ 560-563 (May 3, 1993) ("Report and Order"). In the FNPRM the Commission asked for comments on whether it should exclude low-penetration systems from the sample of cable rates on which it based its benchmark tables. The City believes that the intent of Congress requires that those systems be excluded from the benchmark sample.

In the Cable Television Consumer Protection and Competition Act of 1992, codified at scattered sections of 47 U.S.C. ("1992 Cable Act"), Congress permitted regulation of cable system rates except where a cable system is "subject to effective competition." Cable Communications Policy Act of 1984, § 623(*l*), 47 U.S.C. § 543(*l*) ("Cable Act"). For the purpose of determining

when rates could be regulated, the 1992 Cable Act defined a system as subject to "effective competition" when:

> (A) fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system;
>
> (B) the franchise area is--
>
> (i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and
>
> (ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area; or
>
> (C) a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area.

Cable Act § 623(*l*), 47 U.S.C. § 543(*l*)

The Report and Order established a set of benchmark rates to be used both by franchising authorities and by the Commission in establishing reasonable rates for cable systems not subject to effective competition. Report and Order at ¶¶ 171 ff. The Commission concluded that competition itself should provide the standard of reasonableness for such rates: that is, the goal of rate regulation should be to set rates at the levels they would assume in a fair competitive market. Id. at ¶¶ 179-180. The Commission chose to determine what a fair competitive rate would be by conducting a survey of actual current cable rates. Id. In particular, the Commission focused on the rates charged by systems that appeared to meet one of the three conditions specified in the statute's definition of "effective competition." Id.

The City of Alexandria believes the sample of actual cable rates used by the Commission in generating the benchmark tables was seriously flawed. When the Commission included systems that, according to the Commission's survey data, met any of the three statutory conditions quoted above,[1] it biased the sample so that it was impossible for the results to replicate competitive prices. The Congressional decision not to permit rate regulation in communities with cable penetration below thirty percent is not a decision that those communities represent competitive prices for cable services. Systems in category (A) -- "low penetration" systems, where fewer than 30% of the population subscribes -- are not a reliable source for competitive prices. Such systems do not face actual multichannel competitors, as do those systems which fall within categories (B) and (C).[2] There are several reasons why low penetration systems may charge rates higher than a truly competitive market would produce.

(1) Low penetration may be explained by excessively high prices. The simplest explanation for low penetration is that an operator's rates are too high. In some cases the rate may be too high absolutely -- for example, in low-income franchise areas residents simply do not have much disposable income. In others, rates may be too high relative to the poor quality of service

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[1] See Report and Order at ¶ 199, Appendix E.

[2] The City does not address the question of whether the Commission's data base accurately reflects the rates and

offered. To take either case as an example of a competitive rate would drastically misinterpret the data.

(2) Low penetration may also result from a failure to serve the entire franchise area. The Commission has stated that it will measure penetration by comparing the number of homes subscribing with the number of homes in the entire franchise area, whether or not the cable operator is actually offering service to all of these homes. Report and Order at ¶ 18 and n. 45. Low penetration cable operator survey responses may well be from operators authorized to serve a large franchise area, but who chose to build out only a relatively small part of it -- for example, serving only high-density urban neighborhoods as opposed to more widely-spaced rural dwellings. Thus an operator serving only a small section of a county might have considerable penetration, and monopoly pricing power, in that section, even though the operator serves less than 30% of the entire county. Survey prices reported may thus be much higher than actual competition would allow. Such a situation might also arise where

intended that rate regulation recapture for consumers the monopoly profits extracted by cable operators. See, e.g., 1992 Cable Act at Section 2(a)(2); H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 62, reprinted in 1992 U.S.C.C.A.N. 1231. Hence any regulated rate should reflect a true competitive price. But, as noted above, the (A) systems do not necessarily represent competitive prices.

This conclusion is supported by the fact that the evidence before Congress had identified about a $6 billion savings that would result from competitive prices. Comments of John Windhausen, Staff Counsel, Senate Committee on Commerce, Science & Transportation, at a seminar sponsored by the Federal Communications Bar Association, May 26, 1993 ("Windhausen Comments"). The Commission, however, has stated that its current benchmarks may recapture only about $1 billion in monopoly profits. Excluding the low-penetration systems from the benchmark sample would reduce the benchmark rate to approximately 28% below non-competitive rates, as opposed to 10% under the current benchmarks. See FNPRM at ¶¶ 560-61, Report and Order at ¶ 205. This would more accurately reflect the "competitive" prices that the Commission intended to use. The response of congressional leaders to the Commission's current proposed benchmark approach bears out this fact. See Windhausen Comments.

Conclusion

The City respectfully asks the Commission to ensure that low-penetration systems are not included in any calculation of benchmark rates for purposes of rate regulation.

Respectfully submitted,

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